No. 14-47

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner hereby incorporates by reference the disclosure statement filed with the petition for a writ of certiorari on July 14, 2014.

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ARGUMENT

I. The Extraordinary Costs of EPA's Efforts to Transform an Essential Industry Make This Case Worthy of This Court's Attention.

In his dissent to the panel decision, Judge Kavanaugh recognized the importance of this case to American society. The costs of the Mercury and Air Toxics Standards ("MATS") Rule are immense:

> The estimated cost of compliance with EPA's Final Rule is approximately $9.6 billion per year, *by EPA's own calculation*.... To put it in perspective, that amount would pay the annual health insurance premiums of about two million Americans.... Put simply, the Rule is "among the most expensive rules that EPA has ever promulgated."

Pet. App. 82a (emphasis in original) (citation omitted). And even though EPA's $9.6 billion figure appears to be an underestimate,[1] these costs reflect only part of EPA's broader effort to restructure the American electric utility industry through revisionist interpretations of established Clean Air Act programs. See, *e.g.*, *UARG* v. *EPA*, 134 S. Ct. 2427, 2442, 2444 (2014) (remanding greenhouse gas "prevention of significant deterioration" and Title V per-

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[1] EPA's modeled retirements have proven to be more than an order of magnitude below reality. Utility Air Regulatory Group ("UARG") Pet. 34.

mitting requirements); *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (rejecting EPA's statutory interpretation underlying its regional interstate transport program and remanding the case for "as applied" challenges); see also 79 Fed. Reg. 34,830 (June 18, 2014) (proposing environmental dispatch, renewable portfolio, and demand-side management standards for electric utility steam generating unit ("EGU") greenhouse gas emissions pursuant to Clean Air Act § 111(d), 42 U.S.C. §7411(d)). Indeed, EPA estimates that its proposed §7411(d) standards for EGU greenhouse gas emissions *alone* will impose more than $5 billion in annual costs on the electric utility industry *above and beyond* the $9.6 billion in annual costs imposed by the MATS Rule. UARG Pet. 36 (describing costs of the proposed rule).

There is no dispute about the magnitude of the costs imposed by the MATS program—they are EPA's own estimates. And while, as Judge Kavanaugh said, "the benefits of this Rule are disputed," Pet. App. 83a, the federal respondents' brief confirms that any residual risk associated with EGU hazardous air pollutant ("HAP") emissions is dwarfed by the regulatory costs. As EPA concedes, the quantified benefits of reducing HAP emissions under the MATS Rule would amount to only about $4 to $6 million each year. EPA Opp. 12 n.6, 28.[2]

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[2] Even without the MATS Rule, mercury emissions from power plants fell from 50 tons in 1994-1995 to 29 tons in 2010 as a result of *other* regulatory programs. *Compare* EPA, Study of HAP Emissions from EGUs—Final Report to Congress, Vol. 1,

And while EPA projected that the additional controls required to produce that $4 to $6 million HAP benefit would also result in substantial "co-benefits" by reducing fine particulate matter ("$PM_{2.5}$"), a conventional pollutant already regulated under the National Ambient Air Quality Standard ("NAAQS") program, 42 U.S.C. § 7409, "EPA made clear...that the RIA [projecting these co-benefits for non-HAPs] *played no role* in its finding that regulating [HAP emissions from] power plants was 'appropriate and necessary' under Section 7412(n)(1)(A)." *Id.* at 12 (emphasis added).[3]

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at 7-8 (Feb. 1998), Docket ID No. EPA-HQ-OAR-2009-0234-3052 (hereinafter "Utility Study") *with* 76 Fed. Reg. 24,976, 25,002 (May 3, 2011) (proposed MATS Rule). This decrease raises questions about the need for a $9.6 billion program to address residual mercury risk.

[3] While EPA says there may be other unquantified benefits associated with its MATS Rule, EPA Opp. 12-13, EPA disavowed any reliance on comparison of costs and benefits as a basis for the Rule. *Id.* at 12. Examination of federal respondents' brief illustrates why EPA did not attempt to rely on such "unquantified" benefits. For example, while federal respondents assert that 7% of American women were exposed in 2000 to mercury levels that exceeded a "health-protective level," *id.* at 6, substantial reductions in mercury have occurred in recent years, see *supra* note 2, and moreover, that "health-protective level" included an order of magnitude safety factor. EPA, Integrated Risk Information System, Methylmercury §I.A.3, http://www.epa.gov/iris/subst/0073.htm (last updated Aug. 9, 2012). And, contrary to the assertion of health and environmental respondents, Am. Academy of Pediatrics Opp. 16 n.6, EPA *did* study the acute effects of HCl emissions and found that the *highest* level of exposure was a mere 0.7% of the level of potential concern. Utility Study, *supra* note 2, Vol. 1, at 6-19

Beyond the MATS Rule's own extraordinary costs, the MATS program reflects but the initial step in an EPA campaign to fundamentally change how the electric utility industry generates electricity. Fifty-four gigawatts ("GWs") of coal-fired generation—one sixth of the Nation's coal-fired capacity—have been, or will be, retired as a result of the Rule by 2016. UARG Pet. 34 (citing U.S. Energy Information Administration analysis); see also U.S. Government Accountability Office, GAO-14-672, EPA Regulations and Electricity: Update on Agencies' Monitoring Efforts and Coal-Fueled Generating Unit Retirements, at 17 (Aug. 2014), *available at* http://www.gao.gov/products/GAO-14-672 ("About three-quarters of the retirements we identified in our analysis...are expected to occur by the end of 2015, corresponding to the initial April 2015 MATS compliance deadline...."). MATS-prompted retirements mark only the initial wave, with dozens of additional GWs of coal-fired EGU capacity projected to retire once EPA's §7411(d) performance standards are imposed. UARG Pet. 36 (citing 79 Fed. Reg. at 34,933); see also David Harrison, Ph.D., et al., NERA Economic Consulting, Potential Energy Impacts of the EPA Proposed Clean Power Plan at S-6 to S-7 (Oct. 2014), *available at* http://www.nera.com/publications/archive/2014/potential-impacts-of-the-epa-clean-power-plan.html (projecting potentially over 100 GWs of additional retirements through 2031).

Table 6-13; see also National Mining Association Reply in Support of Petition, Case No. 14-49.

Electricity is an essential commodity, and the electric utility industry is critical to the public health, the public welfare, and the productive capacity of the Nation's population. UARG Pet. 34 (citing *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 272 (1976)).[4] The extraordinary impacts of this Rule on this essential industry—and EPA's conclusion that "*it is irrelevant how large the costs are or whether the benefits outweigh the costs in determining whether it is 'appropriate' to regulate electric utilities under the MACT program*," Pet. App. 83a (emphasis in original)—alone make this case worthy of certiorari. But certiorari is also important to address a more fundamental issue: EPA's ongoing effort to expand a focused delegation of Clean Air Act authority into a license to transform an essential industry.

II. Certiorari Is Needed to Address EPA's Interpretation of the "Appropriate and Necessary" Decisional Standard in 42 U.S.C. §7412(n) to Eliminate the Distinction Between "Residual Risk" Regulation

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[4] See also House Debate on the Clean Air Act Amendments of 1990 Conference Report (Oct. 26, 1990) (statement of Rep. Michael Oxley), *reprinted* in 1 A Legislative History of the Clean Air Act Amendments of 1990, at 1417 (1993) (§7412(n) was written to "protect[]...the public health while avoiding the imposition of excessive and unnecessary costs on residential, industrial, and commercial consumers of electricity."); *Sierra Club* v. *Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) (*per curiam*) ("The district court was correct in concluding that a steady supply of electricity during the summer months, especially in the form of air conditioning to the elderly, hospitals and day care centers, is critical.").

Under §7412(f), (m), and (n) and Categorical HAP Regulation Under §7412(c) and (d), and to Obliterate the Distinction that Congress Drew Between §7412 Regulation of EGUs and §7412 Regulation of Other Sources.

When it promulgated the final MATS Rule, EPA argued there was nothing in the "appropriate and necessary" decisional standard that contemplated regulating only those EGU HAP emissions posing a health hazard, or that required EPA to consider costs in applying that decisional standard. Pet. App. 212a. The panel majority upheld EPA's view of congressional intent. Pet. App. 25a-28a. The federal respondents now defend the panel majority based on the following premises:

- "Section 7412(c) generally deprives the EPA of any discretion to consider costs when deciding whether to include a source category on the list of those subject to regulation." EPA Opp. 18.

- "Those statutory directives [of 42 U.S.C. §7412(c)(1), (2), and (3)] are mandatory and do not authorize the EPA to consider the compliance costs associated with regulating either ['major' or 'area']...source[s] when making the initial listing decision." *Id.*

- "Section 7412(c)(9) does not authorize the agency to consider costs" when

"*delet[ing]* any major or area source category from the list." *Id.*

- Section 7412(d)(2) "does require the agency to consider costs when deciding whether to set the proper *level* of permissible emissions *beyond* the minimum level required by Section 7412(d)(3)." *Id.* at 19-20 (second emphasis added).

What the federal respondents extract from these provisions written for non-EGU sources is that (i) "Congress made cost irrelevant to the initial listing decision, *id.* at 20, and that (ii) "the agency was required to establish emissions standards for *all* listed" HAPs once it found that "it is 'appropriate and necessary' to regulate power plants generally." *Id.* at 16. In other words, the federal respondents believe that EPA has discretion to transform the broad "appropriate and necessary" decisional standard for regulating specific EGU HAP emissions under §7412(n)(1)(A) into the restrictive decisional criteria established in §7412(c) for the initial "listing" of source categories *other than* EGUs.[5]

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[5] See EPA Opp. 21 ("[T]he agency in making th[e 'appropriate and necessary'] determination reasonably looked to the process that Congress had established in listing other source categories."); *id.* at 29 ("Once listed...[EGUs] are properly treated like other listed source categories...."). But see Pet. App. 84a-85a ("the majority opinion...does not sufficiently account for the fact that treating electric utilities differently from standard sources was the intent of Section 112(n)(1)(A), as revealed by the statutory text," and if Congress had not "intended EPA to consider

In transforming EGU regulation under §7412(n) into a command (or authorization) to regulate all EGU HAP emissions under §7412(c) and (d), EPA ignores the distinction between (i) a §7412 program that calls for new categorical technology-based regulation of HAPs, and (ii) the very different §7412 program that calls for additional, or "residual," "risk-based" regulation of HAPs following implementation of control technology and other reduction measures at EGUs as a result of other programs in the Clean Air Act. Sections 7412(c) and (d) form the "core" §7412 program enacted to initiate regulation of HAP emissions from a broad spectrum of source categories. In contrast, §7412(n), like §7412(f) and (m), calls for risk-based regulation of emissions that remain *after* HAPs have been reduced under other control programs. This distinction makes all the difference.

To begin, residual risk regulation by its very nature requires a pollutant-specific evaluation. Under such programs, only those remaining HAP emissions that present an unacceptable risk can trigger regulation. For example, §7412(f) is directed at residual risks posed by "sources" in regulated "categories or subcategories," and calls for a study identifying any risks posed by specific pollutants remaining after

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the costs of regulating electric utilities" as a "threshold decision in deciding *whether* to regulate electric utilities under the MACT program to begin with," Congress could have "automatically regulated electric utilities under the MACT program, as it did with other sources") (Kavanaugh, J., concurring in part and dissenting in part) (emphasis added).

§7412(d) technology-based regulation. For any such risks, EPA must establish standards protective of public health and the environment. Costs must be considered in setting these residual risk standards.[6] Like §7412(f), §7412(m) also calls for a "report" that identifies "whether the other provisions of this section [§7412] are adequate to prevent serious adverse effects to public health or widespread environmental effects." *Id.* §7412(m)(6). If regulation under those "other provisions" is inadequate, "the Administrator shall...promulgate...such further emission standards or control measures as may be *necessary and appropriate* to prevent such effect." (Emphasis added). Again, a pollutant-specific risk-based evaluation resulting in pollutant-specific standards is contemplated.[7]

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[6] In evaluating any "adverse environmental effect" under §7412(f), the statute directs EPA to "tak[e] into consideration costs." For health-based "ample margin of safety" review under §7412(f), Congress explicitly endorsed, in §7412(f)(2)(B), a 1989 HAP rule in which EPA considered cost and a range of other factors in evaluating whether there was an "ample margin of safety." See 71 Fed. Reg. 76,603, 76,608 (Dec. 21, 2006).

[7] By comparison, §7412(d)(3) determines a standard's minimum level of stringency (or "floor") *without* considering cost. Cf. Calpine Opp. 12 ("Congress explicitly eliminated any EPA discretion in 112(d)(3)...."); *id.* at 18 (noting "EPA's nearly exclusive use of Floor Standards"). By contrast, to establish standards more stringent than the "floor" under §7412(d)(2), EPA must evaluate cost and other factors on a pollutant-by-pollutant basis. *See id.* at 18 n.17 (recognizing that a "beyond-the-floor" standard was set only for mercury emissions from low-rank coal units in the MATS Rule). In this sense, §7412(d)(2) standards,

Section 7412(n) speaks in similar terms, except that the study focuses only on those "public health" hazards resulting from those HAP "emissions by electric utility steam generating *units*...[that remain] after imposition" of other CAA requirements. (Emphasis added). In discussing risks posed by emission "units," not risks posed by "source categories," §7412(n) underscores that only those HAPs emitted by those units posing health risks may be regulated. As a result, an "appropriate and necessary" finding that HAP emissions from certain EGUs threaten health cannot justify regulation of HAP emissions from EGUs that pose no public health hazard.[8]

Finally, it would be "a strange and asymmetric scheme," EPA Opp. 21, to construe the statute, as EPA does, to exclude consideration of costs under the

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like residual risk standards, will be driven by individual pollutant characteristics.

[8] In the Clean Air Act, Congress interchangeably uses the term "source," "unit," and "facility" to refer to individual structures that emit a pollutant. See, *e.g.*, 42 U.S.C. §§7411(a), 7412(a). In contrast, source "category" refers to all sources within a particular industrial grouping. See, *e.g.*, 40 C.F.R. §52.21(b)(1)(iii). Federal respondents attempt to refute the pollutant-specific nature of §7412(n) regulation by asserting that "[u]nder the plain terms of the statute, the required determination concerns whether regulation of a particular *source category* 'is appropriate and necessary,' not whether regulation of particular types of emissions satisfies that standard." EPA Opp. 30 (emphasis in original). Because §7412(n) does not refer to "source category" but to "electric utility steam generating units," the statute clearly requires EPA to show that a particular type of emissions from particular EGUs pose a health hazard that is "appropriate and necessary" to regulate.

broad "necessary" and "appropriate" language in subsections (m) and (n), when pollutant-specific decisional standards under other provisions (including subsections (d)(2) and (f)) explicitly or implicitly require consideration of costs in requiring further regulation. EPA's interpretation frustrates any congressional expectations that regulation of EGUs would be based on consideration of all factors relevant to the "appropriate and necessary" residual risk decisional standard established by §7412(n)(1)(A), and not on the cost-blind regulatory criteria governing § 7412(c) and §7412(d)(3) decisions. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (explaining that an agency must consider the relevant factors when exercising its discretion under the governing statute).

As to this, the panel majority did not take issue with their dissenting colleague's observation that the "centrality of cost consideration to proper regulatory decisionmaking" necessarily establishes "cost" as being among the "relevant factors" that a regulatory agency must normally take into account. Pet. App. 78a. Instead, the panel majority excused EPA's refusal to consider the cost of EGU regulation under §7412(n) solely on the basis of Congress' having used the word "cost" in some provisions of §7412 (*i.e.*, provisions that involve regulation of residual risks) and not having used it in others (*i.e.*, provisions that apply generally to the regulation of source categories *other than* EGUs). *Id.* at 26a-27a. Again, such statutory (mis)interpretation fails to take account of the different approach that Congress intended that EPA

take in determining whether residual risks from identified EGU HAP emissions were "appropriate and necessary" to regulate.

In *Entergy Corporation* v. *Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009), this Court cautioned against an interpretative approach under which an inference was drawn that "silence" with respect to the permissibility of EPA's considering a particular "relevant factor[ ]" meant that EPA should forgo consideration, where the statutory provision at issue was "silent not only with respect to" that one factor "but with respect to all potentially relevant factors." "If silence here implies prohibition," the Court pointed out, "then the EPA could not consider *any* factors in implementing [the statutory provision] – an obvious logical impossibility." *Id.*

That is the very error in interpretative logic that both EPA and the panel majority have committed here. According to EPA, Congress' failure to have employed the word "cost" in the "appropriate and necessary" decisional standard of §7412(n)(1)(A) indicates that EPA was not to consider cost in determining that it was "appropriate and necessary" to regulate EGU HAP emissions.[9] At the same time, *nothing* on the face of the plain language of § 7412(n)(1)(A) purports to identify *any* of the "relevant factors" that should inform EPA's exercise of discretion in determining whether it is "appropriate

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[9] See, e.g., Pet. App. 212a ("Cost does not have to be read into the definition of 'appropriate....'"); see also *id.* at 26a ("[T]he word 'costs' appears nowhere in subparagraph (A)" of §7412(n)(1).).

and necessary" to regulate EGUs. As in *Entergy Corporation*, EPA's approach "surely proves too much." 556 U.S. at 222.

CONCLUSION

In this MATS rulemaking, EPA necessarily erred in construing the "open-ended," "ambiguous," and "inherently context-dependent" term "appropriate" as allowing the Agency to forgo an indisputably relevant factor: the extraordinary costs of transforming how the electric utility industry generates electricity.[10] Given the consequences of the MATS Rule, as set forth in this reply and in UARG's petition, granting certiorari here is plainly warranted.

Respectfully submitted,

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[10] See Pet. App. 26a (quoting *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1659 (2011)).